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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1373

ANTONIO HERNANDEZ REYES,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Antonio Hernandez Reyes, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on April 2, 1975.

OPINION BELOW

The opinion of the Court of Appeals below was not reported, and neither was the opinion of the District Court below reported.

JURISDICTION

The judgment of the Court below was entered on April 2, 1975. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether there was probable cause for the defendant's warrantless arrest leading to the search that produced evidence on which rests his conviction for possession of marijuana with intent to distribute, where federal agents received a general and conclusory trip from an informant and observed defendant merely loading some boxes and some brown garbage bags along with some clothes into an automobile.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fourth Amendment, United States Constitution.

2. The Fourteenth Amendment, United States Constitution.

3. The statute under which Petitioner was prosecuted, though nothing turns on its terms, was Title 21 United States Code, Section 841 (a) (1), which provides as follows:

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(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

STATEMENT

The facts necessary to place in its setting the question now raised can be briefly stated:

Petitioner and James Robert Edwards were indicted on April 17, 1973, for an alleged violation of Title 21 United States Code, Section 841 (a) (1), possession with intent to distribute a controlled narcotic substance, to-wit, marijuana. They were subsequently arraigned and entered a plea of not guilty to the indictment.

Before the trial, Petitioner and James Robert Edwards moved to suppress the use in evidence against them of marijuana that had been taken from Petitioner's automobile on the grounds that such evidence had been secured through an unlawful search and seizure. After the hearing, the U. S. District Court for the Southern District of Texas, Corpus Christi Division found that the arresting officers had probable cause to arrest Petitioner and Edwards, and thereby overruled the Motion to Suppress.

At the subsequent trial, that evidence was offered and over Petitioner's and Edward's renewed objection,

was received in evidence. On July 16, 1974, Petitioner was found guilty by a jury in the United States District Court for the Southern District of Texas, Corpus Christi Division, Criminal No. 73-C-104.

On August 30, 1974, the District Court entered judgment and Petitioner was sentenced to three (3) years imprisonment.

This judgment and sentence was affirmed by the Court of Appeals for the Fifth Circuit, Antonio Hernandez Reyes v. United States of America, No. 74-3410. On April 16, 1975, Petitioner filed his Motion for Stay of Mandate and on April 17, 1975, the Court of Appeals entered its order denying the Motion.

REASONS FOR GRANTING THE WRIT

This case merits review by this Court on certiorari because the decision of the Court of Appeals is in direct conflict with the holdings of the Supreme Court in *Spinelli* v. *United States*, 393 U.S. 410 (1969), *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Henry* v. *United States*, 361 U.S. 98 (1959).

Here the only issue is whether there was probable cause, based on an informant's tip, for the warrantless arrest of Petitioner leading to the search that produced the evidence on which rests his conviction.

Essentially, the government agents knew three items upon which they based their authority to stop

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and search Petitioner's automobile. First, they had a tip from an informant that Petitioner would be involved in a marijuana transaction either that day or the next day; and second they observed Petitioner and two other individuals loading "some boxes and some brown garbage bags" in the trunk of the rented automobile and some in the back seat along with some clothes; and third, they allegedly knew Petitioner by reputation. The Court of Appeals simply placed this case on its Summary Docket Calendar and then affirmed the conviction citing *Draper* v. *United States*, 358 U.S. 307 (1959). The Court of Appeals has, we submit, misinterpreted and unduly extended the holding of *Draper* that an informant's credibility may be established by showing that the information given by the informant was corroborated by the investigation of the government agents involved. In *Draper*, supra, the arresting officers, before arresting the defendant and searching his handbag and finding heroin, verified by personal observation the correctness of *detailed facts* previously supplied by a reliable informant. That is not the situation here.

In the present case only general and conclusory information was furnished by the informant, to-wit: that Petitioner would be involved in a marijuana transaction, there was going to be a transporting of a quantity of marijuana either that day or the next day; that Petitioner had a white over blue Ford. This "meager report could easily have been obtained from an offhand remark heard at a neighborhood bar." *Spinelli*, supra at 417.

The government agents, after receiving the informant's conclusory tip, began a surveillance and observed Petitioner with two other persons loading "some boxes and some brown garbage bags" and clothes into the back seat and trunk of the rented automobile. This innocent seeming activity on Petitioner's part does not sufficiently corroborate the informant's tip to support a finding of probable cause. This case presents, we submit, a clear example of the type of situation in which there is an insufficient basis for crediting the informant's assertions to permit the government agents to believe that a crime had been committed. The fact that afterwards contraband was discovered is not enough. The Court of Appeals carries *Draper* to the point where general and broad information, without detailed facts and without detailed verification, can be used by government agent to arrest and search a citizen.

While the particular offense here involved is not of great significance, the principal at stake is. A general and conclusory tip may be received from an informant by government agents and on this basis the government can arbitrarily conclude that they have corroborrated this general information and arrest an individual. We submit that the principal that under our system suspicion is not enough for an officer to lay hands on a citizen should be reaffirmed and that *Draper* should be restricted to instances where there has been furnished detailed information. "It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest." *Henry* v. *United States*, 361 U.S. 98, 104 (1959).

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CONCLUSION

The judgment below is a unique departure from decisions of this Court which require that if an arrest without a warrant is to support an incidental search it must be made with probable cause. As such, it represents a breach in the wall erected by the Fourth Amendment to the United States Constitution and the decisions of this Court which were designed to protect a citizen from being arrested by his Government without probable cause. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-3410
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ANTONIO HERNANDEZ REYES,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(April 2, 1975)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

Appellant was found guilty by a jury and convicted of possession of marijuana with intent to distribute in

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* Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409.

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violation of 21 U.S.C. § 841 (a)(1). On this appeal he claims that the search and seizure which resulted in his indictment was illegal. We find no merit in his contention. Draper v. United States, 358 U.S. 307, 3 L.Ed.2d 327 (1959).

AFFIRMED. See Local Rule 21.[1]

APPENDIX "B"

JUDGMENT AND COMMITMENT

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

United States of America

versus No. 73-C-104

ANTONIO HERNANDEZ REYES

On this 30th day of August, 1974 came the attorney for the government and the defendant appeared in person and by counsel, Tony Canales.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of possession with intent to distribute a quantity of Marihuana in violation of Title 21, United

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1 See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

States Code, Section 841(a)(1) as charged in the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS

IT IS ADJUDGED that a special parole term of THREE (3) YEARS is also imposed.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ OWEN D. COX
OWEN D. COX
United States District Judge.

V. BAILEY THOMAS
Clerk.

Approved as to form:
/s/ B.S.R.
B. STEPHEN RICE, AUSA

Done at Corpus Christi, Texas, this 6th day of September, 1974.

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AFFIDAVIT

I, J. A. Canales, one of the attorneys for Antonio Hernandez Reyes, Petitioner herein, and applicant to the Bar of the Supreme Court of the United States, hereby certify that, on the ____ day of April, 1975, I served copies of the foregoing Petition For A Writ of Certiorari to the Supreme Court of the United States in preliminary form on the several parties thereto, as follows:

1. On the United States, by mailing a copy in preliminary form in a duly addressed envelope, with air mail postage prepaid, to Mr. James R. Gough, Esq., Assistant United States Attorney, P. O. Box 61129, Houston, Texas, 77061.

2. On The Solicitor General, Department of Justice, Washington, D.C., 20530 by mailing a copy in preliminary form in a duly addressed envelope, with air mail postage prepaid.

And that several copies in final form were forwarded in like manner on the ____ day of April, 1975.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 74-1373

ANTONIO HERNANDEZ REYES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that there was no probable cause for the search of his car.

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possessing marihuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and was sentenced to three years' imprisonment, to be followed by a special parole term of three years. The court of appeals affirmed *per curiam* (Pet. App. 8-9).

On February 7, 1973, an informant told Agent John Donald, Jr. of the Drug Enforcement Administration that petitioner would be transporting, either on that day or the following, "a lot of Marijuana" that had been smuggled into the country, and that he possessed or had access to a white over blue Ford automobile (A. 10-12).[1]

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[1] "A." refers to the joint appendix filed in the court of appeals.

The unnamed informant had given Donald "[v]ery reliable" information at least a dozen times before (A. 40). The agent knew that petitioner had a reputation for involvement in marihuana transactions (A. 41).

Agent Donald drove to petitioner's house and saw a white over blue Ford and a 1972 Buick Skylark parked in front. From a registration check he learned that the Ford was registered to petitioner and that the Buick was rented. A short while later petitioner drove away from the house in the Buick; Donald followed him to an automobile rental agency, where petitioner exchanged the car for another 1972 Buick Skylark and returned home (A. 13-16). Donald knew from experience that rental cars were "very common[ly]" used in drug trafficking as a means both of concealing the identity of the vehicle used at any given moment and of avoiding forfeiture (A. 42).

Agent Louis Dracoulis had meanwhile begun surveillance from behind petitioner's house. When petitioner returned he drove to the rear of the house and parked; there, assisted by two other males, he made repeated trips between the house and the Buick, loading boxes and plastic garbage bags full of an undetermined substance into the rear seat and trunk of the Buick (A. 60-61, 96). The agents knew that garbage can liners are an "extremely common" means of transporting marihuana (A. 42).

Petitioner and his companions then drove away separately, petitioner in the Buick. The agents followed him onto Interstate 37, where he drove very slowly until joined in convoy by one of his companions; he then accelerated to the legal speed limit (A. 18-19).

BLEED THROUGH

The agents then stopped both cars, blocked the path of petitioner's car with their vehicles, and approached it on both sides with their revolvers drawn and at their sides (A. 22-23). As Dracoulis approached on the driver's side petitioner rolled down the window and Dracoulis immediately smelled what he believed to be marihuana (A. 91). Displaying his badge, he identified himself and asked petitioner what he was carrying; petitioner replied, "Marijuana" (*ibid.*). While Donald searched petitioner, Dracoulis opened the boxes on the back seat and confirmed that they contained marihuana. The agents then arrested petitioner.

1. The court of appeals correctly concluded that the search and seizure were legal. The tip, from an informant who had proven "[v]ery reliable" on numerous prior occasions, that petitioner would be transporting smuggled marihuana either on that day or the next and that he had a white over blue Ford, had been partially corroborated. It was supplemented by the agents' knowledge of petitioner's reputation (see *United States* v. *Harris,* 403 U.S. 573, 583) and personal observations of his suspicious use of rental cars, his loading of the rental car with packages commonly used to carry marihuana (cf. *Henry* v. *United States,* 361 U.S. 98, 104), and his seemingly prearranged convoy driving.

This information was sufficient to "permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed" (*Spinelli* v. *United States,* 393 U.S. 410, 418; *Draper* v. *United States,* 358 U.S. 307, 313) and to provide a "substantial basis" for the agents to conclude that petitioner's car was being used to transport marijuana. *Jones* v. *United States*, 362 U.S. 257, 271; *Carroll* v. *United States,* 267 U.S. 132, 149, 155-156; *Chambers* v. *Maroney,* 399 U.S. 42, 49. Accordingly, the stop and search of the car along the public highway were lawful.

2. Even if the agents did not have probable cause to search the car when they stopped it, they had reasonable suspicion to make an investigatory stop in order "to maintain the status quo momentarily while obtaining more information * * *." *Adams* v. *Willlams,* 407 U.S. 143, 146; *Terry* v. *Ohio,* 392 U.S. 1, 22-23. When Agent Dracoulis detected the smell of marihuana coming from the car, that suspicion ripened into probable cause both to arrest petitioner and to search his car.

The fact that the agents blocked the path of petitioner's car and approached him with guns drawn and at their side did not transform the forcible stop of his car into an arrest. The blockade was reasonable to "maintain the status quo," and, based on their founded suspicion that petitioner was transporting contraband, the agents could reasonably take precautions against the possibility that he was armed.

A law enforcement officer "making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect." *Adams* v. *Williams, supra,* 407 U.S. at 146. Before Dracoulis smelled the marihuana, the agents did not point their guns at, issue an order to, or search petitioner. Compare *United States* v. *Strickler,* 490 F. 2d 378 (C.A. 9).[2] In view of "all the circumstances of the particular governmental invasion of a citizen's personal security" (*Terry* v. *Ohio, supra,* 392 U.S. at 19), the stop of petitioner's car was reasonable.[3]

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[2]In *Strickler* police surrounded the defendant's car, pointed a gun at the occupants, and ordered them to raise their hands. The court said: "The restriction of Strickler's 'liberty of movement' was complete [*i.e.,* he was arrested] when he was encircled by police and confronted with official orders made at gunpoint." 490 F.2d at 380.

[3]Petitioner's reliance on *Henry* v. *United States, supra,* to establish the time of his arrest, is misplaced. *Henry* antedated this Court's approval of investigative stops in *Terry* and *Adams,* and the determination that the time at which probable cause had to exist was when the officers stopped the car was based on a concession by the government limited to that case. See 361 U.S. at 103, n. 7.

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It is therefore respectfully submitted that the petitio
for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.